No. 8953

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United States
Circuit Court of Appeals
For the Ninth Circuit

PHOENIX BLUE DIAMOND EXPRESS, a Corporation,
Appellant,
vs.
DORRIO MENDEZ,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
LORETO LUNA,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
P. N. ESTRADA, Administrator of the Estate of Jesus Valenzula, Deceased,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
FELIX LUGO, by his Guardian Ad Litem, Estavan Sworez,
Appellee.

PHOENIX BLUE DIAMOND EXPRESS,
Appellant,
vs.
ANDRES ACUNA, by his Guardian Ad Litiem, Delores Acuna,
Appellee.

Brief of Appellees

Upon Appeals from the District Court of the United States for the District of Arizona.

MINNE & SORENSON
GEO. T. WILSON
Attorneys for Appellees.

REPUBLIC AND GAZETTE PRINTERY, PHOENIX

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Uuon Appeals from the District Court of the United States for the District of Arizona.

SUMMARY OF ARGUMENT

Appellees' theory is that appellant's liability in these cases rests upon the fact that the latter's truck, at the time of the accident, was being operated in appellant's business.

Brief Page 7.

Appellant's theory is that, at the time of the accident, appellant's employee and driver of the truck had departed from his employment on a mission of his own.

Brief Page 7.

From the admitted fact of appellant's ownership of the truck, a presumption of law arose that it was then being operated in appellant's business, and that the driver was acting in the course of his employment.

Brief Page 8.

Department of Water & Power v. Anderson, 95 Fed. (2d) 577, 584.
Baker v. Maseeh, 20 Ariz. 201, 206.
179 Pac. 53.
Otero v. Soto, 34 Ariz. 87, 90. 267 Pac. 947.

The burden rests on appellant to overcome presumption.

Brief Page 9.

Department of Water & Power v. Anderson, 95 Fed. (2d) 577, 584.
Baker v. Maseeh, 20 Ariz. 201, 206.
179 Pac. 53.
Otero v. Soto, 34 Ariz. 87, 90. 267 Pac. 947.

Appellant contends that its evidence upon the question of departure was uncontradicted, and that appellant was therefore entitled to a directed verdict.

Brief Page 9.

Where the ruling on motion for directed verdict rests upon credibility of witnesses, or weight of their testimony, the matter of directing a verdict is for the trial court, and his ruling will not be disturbed on appeal unless there are no facts or circumstances in evidence which tend to impeach the testimony of such witnesses.

Brief Page 10-15.

Department of Water & Power v. Anderson, 95 Fed. (2d) 577.
Best v. District of Columbia, 291 U. S. 411, 54 S. Ct. 487, 78 L. Ed. 882.
Gunning v. Cooley, supra 281 U. S. 90, 95, 50 S. Ct. 231, 233, 74 L. Ed. 720.
D'Aleria v. Shirey, 9 Cir. 286 F. 523.
Benn v. Forrest, 1 Cir. 213 F. 763, 765.
Crozier v. Noriega, 27 Ariz. 409, 415; 233 Pac. 1104.

Appellees' evidence was sufficient to discredit the testimony of appellant's witnesses on the question of departure.

Brief Page 15-24.

Appellant's requested instruction does not correctly state the law.

Brief Page 24.

Every proper statement of law contained in the requested instruction was given in the general charge, for which reason it was not error to refuse to give the requested instruction.

Brief Page 25.

Department of Water & Power v. Anderson, 95 Fed. (2d) 577, 584.

The question propounded by the juror is not accurately reported in the Transcript of Record.

Brief Page 26-29.

Appellant did not reserve exception to court's failure to answer juror's question until after retirement of the jury.

Brief Page 30-31.

An exception to the court's instructions to the jury taken or reserved after the jury's retirement may not be considered on appeal.

Brief Page 31.

Rule No. 30 of the Rules of Practice of the United States District Court for the Diistrict of Arizona, in force April, 1938.
Arizona & New Mexico Ry Co. v. Clarke, 207 Fed. 817, 823, 824.
Phelts v. Mayer, 15 How. 161, 14 L. Ed. 643.
Lee Tung v. United States, 7 Fed. (2) 111, 112.

Juror's question was not proper under the state of the evidence in the case.

Brief Page 33-35.

Sweeney v. Irving, 228 U. S. 233, 242, 33 S. Ct. 416, 57 L. Ed. 815.
Employers Liability Assur. Corporation Limited of London, England v. Dean, 44 Fed. (2d) 524, 526.
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Allen et al v. Fields et al, 144 Fed. 840, 842.
United States v. Sprinkle et al, 57 Fed. (2d) 968, 970.

ARGUMENT
SPECIFICATION OF ERRORS NOS. I AND II

May we preface our argument by a brief reference to the route of travel of appellant's trucks approaching and entering the city of Phoenix from the city of Tucson, and to the location of the several taverns, cafes, and businesses mentioned in the evidence with relation thereto. A proper understanding of these details will, we believe, tend to simplify the evidence touching the issues raised by appellant under his first two specifications of error. The names, direction, and location of the streets and boulevards, together with the names of the taverns and cafes, are to be found in the testimony of the several witnesses of both appellant and appellees.

At the time of the accident which is the basis of appellees' cases, appellant operated a common carrier business by means of motor trucks from Los Angeles, California, to the cities of Tucson and Phoenix, Arizona. The route of travel of appel-

lant's truck on the trip during which the accident occurred was from Los Angeles, California, to Tucson, Arizona, and thence to Phoenix (129). The highway from Tucson to Phoenix separates into two main arteries about seven miles East of Phoenix —Washington Boulevard and Van Buren Street— and from the point of separation they run parallel in a Westerly direction into and through the city, and either was, at the time of the accident, the customary and authorized route of appellant's trucks entering Phoenix from Tucson (133).

Washington Tavern is located on the South side of Washington Boulevard approximately three miles East of Phoenix. It follows, therefore, that a motor vehicle approaching Phoenix on Washington Boulevard would pass the Washington Tavern, and, if the driver of the vehicle stopped at the Tavern, he would ordinarily, logically, and lawfully park the vehicle along the North curb of the boulevard and facing West toward Phoenix. On the other hand, the driver of a vehicle proceeding East out of Phoenix on Washington Boulevard would, if he stopped at the Tavern, ordinarily, logically, and lawfully park along the South curb facing East.

The Ritz Cafe referred to by appellant's witnesses is located at Third and Jefferson Streets, practically in the heart of the city. Jefferson Street, on which the cafe is located, is one block South of Washington Boulevard and parallel to it. Incidentally, the warehouse, or "docks," of appellant, lo-

cated at 312 South 11th Avenue, Phoenix, Arizona, is approximately one mile West of the Ritz Cafe (132).

The accident in question occurred on Washington Boulevard approximately one and one-half miles West of the Washington Tavern, and between that place and the city of Phoenix.

The broad issue of fact, aside from the legal question of the sufficiency of the evidence argued in appellant's brief, is whether appellant's truck was on its regular trip from Tucson to Phoenix in appellant's business at the time of the accident, or whether that trip had been completed and the truck was then being used by Joe Smith on a mission of his own to the Washington Tavern.

It was, and still is, appellees' contention that, when Joe Smith reached the Washington Tavern on his regular trip from Tucson to Phoenix on the night of the accident, he parked appellant's truck along the North curb of Washington Boulevard (152-153) (156), and after participating unwisely in the festivities of the occasion (New Year's Eve) at the tavern, resumed his employment and his journey towards Phoenix, but before reaching his destination met with the accident in question. Appellant, on the other hand, tried the case on the theory that Joe Smith had completed his regular trip from Tucson to Phoenix and thereafter had taken appellant's truck, without the latter's knowledge, on a mission of his own to the Washington Tavern, and

upon attempting to return to Phoenix met with the accident. The jury, apparently, adopted appellees' theory of the case, and appellant now questions the sufficiency of the evidence for the jury's determination of Joe Smith's agency at the time of the accident.

From the testimony of J. W. Gandee, Vice-President of appellant company (112-114), and that of Joe Smith, the operator of the truck in question (129-131), it is patent that appellant's truck, on the night of the accident, was being operated in its business under a lease from George B. Pace, the President of appellant company. It is further evident from their testimony that the driver of the truck, Joe Smith, while receiving his compensation direct from Pace through some arrangement with appellant company that does satisfactorily appear from the evidence, was, nevertheless, at all times under the control of appellant company and subject to the orders of its officers, and was in the actual control of the truck on the trip from Tucson to Phoenix on the night of the accident (130). He admitted his presence in the truck at the time of the accident, but denied being the actual driver of it (139-140).

With these facts established, and indeed practically admitted by appellant, a presumption, as a matter of the law, immediately obtained that the truck was being operated at the time of the accident in the business of appellant, and that the driver

was then acting within the scope of his employment. This presumption remained until rebutted by appellant.

> Department of Water & Power v. Anderson, 95 Fed. (2d) 577, 584.
> Baker v. Maseeh, 20 Ariz. 201, 206. 179 Pac. 53.
> Otero v. Soto, 34 Ariz. 87, 90. 267 Pac. 947.

To overcome this presumption, and to prove that Joe Smith, in driving appellant's truck from Tucson to Phoenix on the night of the accident, had completed his journey and employment, and thereafter had taken the truck without the knowledge of his employer upon a mission of his own to the Washington Tavern, appellant submitted the evidence of Joe Smith (127-142), William J. Evans (143-147), Calvin Hollis (147-149), and Alex Brady (161-163). As against their testimony, appellees submitted the evidence of Harry Davis (165-167), Garnet Williams (164-165), and Dick Lee (165), one of whom (Harry Davis) directly impeached the testimony of Joe Smith, and all of whom, by their evidence, established facts at variance with the testimony of appellant's witnesses, and affecting their credibility.

It is true that, in one sense, and aside from Joe Smith, the testimony of appellant's witnesses was not directly challenged by appellees' evidence, and because of this, it is now appellant's position—if we understand his argument correctly—that the testimony of such witnesses was conclusive on the issue

of agency, and that the trial court had no recourse other than to direct a verdict in appellant's favor. The weakness of this argument, as we view it, lies in the oversight of certain pertinent facts and circumstances in the evidence from which any reasonable man could logically and properly conclude the fact of agency at the time of the accident.

The rule applicable in the situation presented by the state of evidence in these cases, as we understand it, is that the matter of directing a verdict, particularly where the ruling must rest upon the credibility of witnesses, or the weight of their evidence, is for the determination of the trial court, and his ruling will not be disturbed on appeal unless it appears there are no facts or circumstances which tend to impeach or discredit the testimony of such witnesses. Such facts or circumstances, as pointed out by the Supreme Court of California in a case later cited in this brief, may consist of the manner of the witnesses in testifying, or of the inherent improbability of the accuracy of such testimony, or of a doubt of its accuracy in the light of other credible evidence in the case. It is generally conceded, of course, that in determining these particulars the trial court has the advantage of the appellate court, and for that reason appellate courts are reluctant to disturb the ruling of the trial court when based upon such considerations, and will do so only when there is a total want of substantial evidence supporting the ruling.

In the case of Department of Water & Power v. Anderson, 95 Fed. (2d) 577, cited above, this court has announced the rule, quoting from page 585 of the decision, in language as follows:

> "Another rule is stated in Best v. District of Columbia, 291 U. S. 411, 415, 54 S. Ct. 487, 489, 78 L. Ed. 882: 'Where uncertainty arises either from a conflict of testimony or because the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury.' Thus if there was evidence that the operator of the automobile stole it from defendant, which evidence conflicted with other evidence that the operator did not steal it, but was using the automobile on defendant's business, the question must be presented to the jury for determination. Accordingly, it is stated in Gunning v. Cooley, supra 281 U. S. 90, 95, 50 S. Ct. 231, 233, 74 L. Ed. 720, that where a determination depends 'on the credibility of witnesses, and the effect or weight of evidence,' such determination is to be made by a jury. D'Aleria v. Shirey, 9 Cir. 286 F. 523; Benn v. Forrest, 1 Cir., 213 F. 763, 765; compare Silent Automatic Sales Corporation v. Stayton, 8 Cir., 45 F. 2d 471."

The decisions of this court, and of the Supreme Court of the United States as quoted from the above cited case of Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720, are in complete harmony with the holdings of the Supreme Court of Arizona on the issues here involved. In Crozier

v. Noriega, 27 Ariz. 409, 415; 233 Pac. 1104, the Supreme Court of Arizona adopted the rule as announced by this court in Department of Water & Power v. Anderson, cited above, and applied it in a situation similar to the one now before the court in the present cases. The rule there announced, and its application to the facts of that case, read:

> "It is evident after reading the instructions of the Court that the jury refused to accept the testimony of Miles and Piper on that point, but cast it entirely aside. Can we say, as an appellate court, they had no right to do so? It may be that, if we were sitting as jurors to determine the facts on this evidence, we would find in favor of defendants, but such is not our function. Denver etc. Co. v. Brown, 57 Colo. 484, 143 Pac. 364. It is only where no evidence sustains it, or where it is contrary to the overwhelming weight thereof, that we have the right to disregard the verdict of a jury. Challis v. Woodburn, 2 Kan. App. 652, 43 Pac. 792; Houston etc. R. Co. v. Loeffler (Tex. Civ. App.), 59 S. W. 558. Particularly is this true when the issue is as to the credibility of witnesses, even though not directly contradicted.
>
> "In Davis v. Judson, 159 Cal. 121, 128; 113, Pac. 147, 150, the court says:
>
> > 'While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be

> contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its findings or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy.' "

It is to be noted that the jury in the above Arizona case apparently disregarded the testimony of two of defendants' witnesses who had not been directly impeached, but only inferentially, by other evidence, and that the effect of the latter evidence on the minds of the juror's was to destroy the evidentiary value of the testimony of such witnesses. This is precisely the situation now before this court on the state of the evidence in the cases at bar. On the other hand, the case of Otero v. Soto, 34 Ariz. 87, 267 Pac. 947, strongly urged by appellant as authority in the instant cases (appellant's brief, pages 21-27,) was barren of any fact or circumstance which tended to impair the accuracy of the testimony of two of defendants' witnesses to the effect

that the truck, at the time of the accident, was being used solely in the pleasure and for the purposes of the defendant employee. In that case the Supreme Court of Arizona merely announced the rule, now practically universally acknowledged by all courts, and applied it to the particular state of facts presented by the record in that case. The decision itself does not alter the rule but gives full effect to it:

> "In other words, if any circumstances appear in the case which would justify a reasonable man in discrediting the statement of a witness, the jury may refuse to believe it, even though it is not directly challenged, but they may not arbitrarily reject uncontradicted evidence when nothing intrinsic in the evidence itself or extrinsic in the circumstances of the case casts suspicion thereon. * * *.
>
> "The witnesses Salcido and Gutierrez, who went with Rojas on the trip, both testified positively that it was a pleasure trip only. Their testimony was not impeached or contradicted in the slightest degree. There was nothing to show that they were in any way biased or influenced in favor of Otero, nor was there any circumstance appearing in the case which would justify a reasonable man in refusing to accept their evidence as to the purpose of the trip. This takes their testimony out of the exception to the rule laid down in Crozier v. Noriega, supra, and the jury was not justified in disregarding their statements upon this point. Such being the case, the presumption was over-

come and there was no issue of fact on the matter to submit to the jury, so far as Otero was concerned."

The remaining case urged by appellant as controlling in the present cases is that of Peters v. Pima Mercantile Co., Inc., et al, 42 Ariz. 454, 27 Pac. (2d) 143. In so far as that decision has any bearing in the instant cases, or as regards its authoritative value, it is in the same category as the case of Otero v. Soto, supra. It was practically conceded in the Pima Mercantile Co. case that there was a complete departure by the employee from his employer's business at the time of the accident, and that there was practically no evidence from which any reasonable person could logically or properly reach a different conclusion. That, however, is a very different situation from the one presented by the state of the evidence in the instant cases.

It remains, then, to apply the rule to the evidence in the cases now before the court.

To overcome the presumption referred to in the early part of this argument, appellant submitted the testimony of Joe Smith and attempted to corroborate him by the evidence of the witnesses Evans, Hollis, and Brady to the effect that Joe Smith was at the Ritz Cafe in the city of Phoenix prior to the accident. It is unnecessary to set forth in detail the testimony of Joe Smith, but it will suffice to point out certain glaring defects, conflicts, and inconsistencies in the evidence of appellant on this

point from which the trial court and jury, as a matter of law, were warranted in disbelieving, or, at least, in disregarding such evidence.

Both Joe Smith (132) and J. W. Gandee, Vice-President of appellant company (119), testified that all drivers of the company, including Joe Smith, had orders to report to the company's office "when they arrive in town" (Phoenix). It is true that later, in his redirect examination, Gandee attempted to clarify his testimony on this point by stating (122) that at night time the office of the company was closed, and that drivers arriving in town at night had orders to report their presence the following morning. On recross examination, however, (123) and in answer to an impeaching question concerning his testimony previously given before the Corporation Commission of Arizona concerning this same accident, he admitted that he had there testified, without exception: "Our drivers all have instructions *immediately* upon getting into a town to report to the office *regardless of where he is going.*"

The failure of Joe Smith to report his presence in Phoenix prior to the accident (119) might have been persuasive in the minds of the trial court and jurors that he, in fact, did not reach Phoenix on that fatal trip. In this connection it is worthy of note, too, that Joe Smith did not reach the company's docks or warehouse (132), or the Market Service Station (133), in the city of Phoenix, at either of which places he had general orders from his employer to leave his truck (122). These are

circumstances bearing directly upon the credibility of the testimony not only of Joe Smith, but also of the three witnesses who testified that they saw him at the Ritz Cafe prior to the accident.

Joe Smith further testified that he parked the truck near the Ritz Cafe and arrived in the latter place about 11:30 o'clock at night, that he stayed there about twenty or twenty-five minutes, that he had several drinks of whiskey at the bar and became intoxicated (134), that he met Calvin Hollis at the cafe, that Hollis accompanied him on the truck to the Washington Tavern, and that later he talked to Hollis at the Tavern (137). On the other hand, Hollis testified that while he saw Joe Smith at the Ritz Cafe, he did not accompany him to the Washington Tavern, and that he (Hollis) was not in the Tavern that night (149). Hollis, by the way, was a former employee of appellant company and a close friend of Joe Smith (148).

Again, Joe Smith (132-135) and William J. Evans (145) both testified that several persons left the Ritz Cafe in company with them when they started on their journey to Washington Tavern; but Alex Brady, proprietor of the Ritz Cafe, and another supporting witness for Joe Smith, testified that Joe Smith left his establishment alone (163). It is to be noted, also, that Hollis testified he left the Ritz Cafe prior to the departure of Joe Smith and his companions, while Brady insists that Hollis remained in the Cafe long after that time (163).

All of appellant's witnesses agree emphatically that one Spike Steffans was at the Ritz Cafe during the time Joe Smith and his companions were there, which time has been estimated by the different witnesses from 11:00 o'clock (Brady's testimony) to about 11:50 o'clock that night. As against this positive evidence, appellees submitted the evidence of Garnet Williams (164), supported by the testimony of Dick Lee (165), to the effect that Spike Steffans was at the Washington Tavern at the very time Joe Smith and his companions placed him at the Ritz Cafe, three miles away; and, if the evidence of Garnet Williams and Dick Lee on this point was believed by the Court and jury, certainly their testimony would utterly discredit the testimony of appellant's witnesses, not only as to the whereabouts of Spike Steffans, but also as to the presence of Joe Smith at the Ritz Cafe prior to the time of the accident.

One other witness, William J. Evans, an intimate friend of Joe Smith (144), likewise testified to the presence of Smith in the Cafe prior to the accident. He, too, started on the trip from that place to the Washington Tavern, but apparently never reached his destination. Aside from his positive statements as to the presence of Smith in the Ritz Cafe, his answers to questions on cross-examination, particularly as to his movements after leaving the cafe with Smith and the other gentlemen, consisted principally of, "I don't remember." It is singular indeed that his memory, at the time of trial, served

him so faithfully regarding the presence of Joe Smith and certain other gentlemen, including Spike Steffans, at the Ritz Cafe at a time so advantageous for Joe Smith to be there, and that it completely failed him as to other details closely associated with the events at the Cafe. His explanation of this rather paradoxical state of his memory was logical indeed—"I was intoxicated that night, quite drunk." (146). After viewing his appearance and demeanor while testifying, and listening to his testimony, we are inclined to agree that possibly he was.

Appellant's evidence on the question of agency, particularly of the presence of Joe Smith in the city of Phoenix prior to the accident, was further weakened by appellees' witness Harry Davis who directly challenged and impeached the testimony of Joe Smith (155-161). The impeaching evidence is quoted in full:

> "I had a conversation with Joe Smith on the 14th, 15th or 16th days of January, 1938, or on a day about the middle of that month, at about the hour of 11:30 o'clock in the morning of one of those days, on the premises of Brazee's Service Station that I have testified concerning. No one else was present at the conversation. In that conversation at that time, Joe Smith stated to me, "I had driven from L. A. to Tucson and then up here and was about twenty-five hours on the road without any rest, and when I reached the Washington Tavern on my way in, I was so damn near all in that I thought I would stop and get a shot and see if any of the boys were

around and help me in with the truck," or words to that effect. He also in that same conversation stated to me, "I met some of the fellows in there, had a few drinks and they were not ready to go so I went out and crawled in the sleeper and told them when they were ready to come on out."

Many other conflicts and inconsistencies of appellant's case are apparent in the evidence, but those pointed out above will serve to illustrate the confused and unsatisfactory state of appellant's evidence on the question of agency. This, together with the appearance and demeanor of appellant's witnesses while testifying, undoubtedly raised various misgivings in the minds of the court and jurors touching their credibility and the weight and value to be attached to their evidence; and we submit that, on the basis of appellant's case alone, particularly in the light of the impeaching evidence, the question of agency at the time of the accident was one of fact and not of law. Certainly any doubt as to the sufficiency of appellees' evidence on that point was removed by the further testimony of Harry Davis, in corroboration of appellant's witness W. C. Weaver, as to the location of the truck at the Washington Tavern.

Joe Smith's testimony, it will be recalled, is that upon arriving at the Washington Tavern on his trip from the Ritz Cafe, he parked his truck along the South curb of Washington Boulevard, facing

East toward Tucson. We confess that if such fact had been successfully established there would now be some merit to appellant's argument. However, the appellant submitted the testimony of its witness W. C. Weaver, the proprietor of the Washington Tavern, to corroborate the presence of Joe Smith in the Tavern that night, and on cross-examination, this witness admitted seeing a large "box-car" truck parked near the Tavern—not on the South side of Washington Boulevard facing East, but on the North side of the Boulevard facing West toward Phoenix. In this connection, we pointed out to the court in the early portion of this argument that a motor vehicle driven from Tucson to Phoenix, and approaching the latter city on Washington Boulevard, would be driving West, and if stopped at Washington Tavern would logically, ordinarily, and lawfully be parked along the North curb of the boulevard facing West. This was the identical spot in which the truck was placed by appellant's witness W. C. Weaver.

It is true that the witness Weaver does not identify the truck as one belonging to appellant company, nor does he connect the truck with the presence of Joe Smith in his Tavern. He does testify, however, (152-153) that it was the only truck in front of the Washington Tavern, or near it, on either side of the street that night. He further identified it as "a large truck with a box-car arrangement on the back." (153).

Joe Smith testified (138) that the truck driven by him that night was about thirty-five or forty feet long, and that it was open on top but not on the sides (138). This description, we submit, fits the truck seen by the witness Weaver.

Any doubt, however, concerning the identity of the truck was completely removed by the testimony of Harry Davis. We quote his testimony on that point in full:

> "I have known Joe Smith, who sits in the rear of the courtroom, three or four years more or less intimately. I knew he worked for the Phoenix Blue Diamond Express. I was at the Washington Tavern about the hour of one o'clock in the morning of January 1, 1938. The Washington Tavern is located several miles east of Phoenix on Washington Boulevard. I reached Washington Tavern in Bob Brazee's Buick car. When I arrived at Washington Tavern I saw a Phoenix Blue Diamond Express truck parked on the north side of Washington Boulevard, headed west toward Phoenix, across the boulevard from the Washington Tavern, which is on the south side of the boulevard. I went to that truck that night and walked around it. The sleeper door on the truck was partially open and I am sure I saw Joe Smith lying in it. I tried to wake him up. I said, "Come on, Joe, I will buy you a drink", and no answer. I hollered at him a few more times and he would just mumble something about a dock. I had gone to the Tavern to get a drink and finally Bob Brazee, the fellow with me, said, "Let's

go, he is all right, let him alone", so we left the truck then and went to the Tavern and it (219 was too late to get a drink."

To the weight and effect of the above evidence is to be added the inferences logically and reasonably deductible from the facts and circumstances surrounding and preceding the accident, namely: That the truck in question had that night left Tuscon for Phoenix in appellant's business (131); that it was proceeding to Phoenix on its usual route of travel at the time and place of the accident (115); that it was loaded with freight admittedly being hauled by appellant in the conduct of its business (115), (131); and that the regular driver, Joe Smith, was present on the truck at the time (129). These are material factors to be considered by the court and jury on the question of agency.

Thomas v. Slavens, 78 Fed. (2d) 144, 147.
Woody v. Utah Power & Light Company, 54 Fed. (2d) 220, 222.

In view, then, of the uncertain, confused, and contradicted evidence on which appellant's case rests, and of the direct evidence of both Weaver and Davis from which any reasonable minded person could readily infer that appellant's truck had merely stopped at the Washington Tavern on its trip from Tucson and at the time of the accident had not yet completed its scheduled trip into Phoenix, together with all facts and circumstances surrounding and preceding the accident, appellees' evidence, we sub-

mit, was sufficient, as a matter of law, for the jury's determination of the question of agency, and to justify their findings on that issue.

SPECIFICATION OF ERROR NO. III

Appellant complains of the failure of the trial court to submit to the jury the requested instruction set forth in his brief. (Appellant's Brief, page 51).

Through the requested instruction, appellant attempted to restrict the effect of all facts, circumstances, and testimony tending to impeach Joe Smith solely to his credibility, regardless of the possible bearing and value of such evidence on other vital issues. We believe the trial court properly refused the request.

Evidence may ofttimes have the effect of impeaching and discrediting the testimony of an opposing witness, and at the same time of establishing substantive facts in favor of the party producing it. When it has this dual effect, may a court restrict its evidentary value solely to the credibility of the witness whose testimony it incidentally tends to impeach, and thus rob it of its bearing and effect on other issues in the case? We think not; and to have applied such rule to the instant cases would have been to deny to appellees the value of their most cogent evidence on the question of agency.

Harry Davis, the court will recall, testified that he saw appellant's truck parked along the North curb of Washington Boulevard opposite the Wash-

ington Tavern facing West. This testimony undoubtedly tended to impeach and discredit the testimony of Joe Smith to the effect that the truck was parked along the South curb facing East. At the same time, the further effect of Davis' testimony was to establish a pertinent and substantive fact in favor of appellees, namely, that at that time appellant's truck was on its regular trip from Tucson to Phoenix. It manifestly is not the law that appellees should have been denied the value of Davis' testimony on the issue of agency because such testimony tended to impeach and contradict that of Joe Smith.

We agree, however, that purely impeaching evidence should be restricted in its effect to the credibility of the witness it challenges, and the weight and value to be given his testimony, but this is not the proposition of law stated through the requested instruction. Aside from this, the jury in the present cases were completely and correctly instructed as to the effect of both purely impeaching evidence (178) and uncontradicted testimony (177), in language as follows:

> "You are instructed you can not disregard the uncontradicted testimony of a witness to a particular fact and you must take such uncontradicted testimony as establishing the fact testified to, unless you believe such uncontradicted testimony of any witness has been contradicted by inherent improbabilities as to its accuracy contained in the witness' own statements of the transaction or by circumstances in evidence in connection with the matter which satisfied you

of its falsity. If you find there exist no matters of circumstances which at all impair the testimony of a witness to a particular fact then you must take such testimony as establishing such fact and such testimony then can not be disregarded by you. * * *

"You are instructed that the testimony of plaintiffs' witness, Harry Davis, that Joe Smith made statements at an earlier date contradictory to and different from his statements as a witness in the trial of this case, was admitted solely for the purpose of impeaching Joe Smith. If you believe Joe Smith made the statements Harry Davis testified he did, such statements of Joe Smith do not furnish any positive evidence of the truth of the facts embraced (235) within such statements against the answering defendant but are to be considered only by you for the purpose of affecting the credibility of Joe Smith."

In other words, the general charge to the jury in these cases carried with it every proposition of law advanced in the requested instruction to which appellant was entitled, and no error was committed by the refusal to give the particular instruction.

Department of Water & Power v. Anderson, 95 Fed. (2d) 577, 586.

SPECIFICATION OF ERROR NO. IV

In advancing our argument under this specification of error, we first seriously challenge the accuracy of the question propounded by the juror Ford

to the court, and the proceedings immediately subsequent thereto, as quoted in the Transcript of Record (132):

"Juror Ford: Can I ask you a question?

The Court: All right, what is it?

Juror Ford: In case the jury finds that the truck was driven by any one *other than Joe Smith,* what would be your instructions *as to the liability of the defendant?*

The Court: Well, you take that up with the other jurors.

Juror Ford: Sir?

The Court: You haven't found anything yet. Wait until you get into your jury room.

Juror Ford: All right.

The Court: How do you know that the jury will find that? There will be five forms of verdict submitted, one in each case, gentlemen, one for the defendant and one for the plaintiff in each case. In the event your verdict is for the defendant, you will sign that form of verdict. In the event your verdict will be for the plaintiff you will insert the amount of damages you find and have that verdict signed by your foreman. Your verdict, of course, must be unanimous.

To the court's refusal to answer question asked by Juror George O. Ford, the defendant, Phoenix Blue Diamond Express, a corporation, excepted."

The reporter's transcript of the evidence, certified as correct by the reporter Louis L. Billar, reports the colloquy between juror Ford and the court, and the proceedings immediately subsequent thereto, including the time and manner of appellant's exception to the failure of the court to answer the juror's question, as follows:

"The Court: After you retire to your jury room, gentlemen, you will select one of your number to act as foreman.

Juror Ford: Can I ask you a question?

The Court: All right, what is it?

Juror Ford: In case the jury finds that the truck was driven by anyone else, in your opinion what would be your instructions as to the truck?

The Court: Well, you take that up with the other jurors.

Juror Ford: Sir?

The Court: You haven't found anything yet. Wait until you get into your jury room.

Juror Ford: All right.

The Court: How do you know that the jury will find that? There will be five forms of verdict submitted, one in each case, gentlemen, one for the defendant and one for the plaintiff in each case. In the event your verdict is for the defendant, you will sign that form of verdict. In the event your verdict be for the plaintiff you will insert the amount of damages you find and

have the verdict signed by your foreman. Your verdict, of course, must be unanimous.

Swear the bailiff.

(Thereupon the bailiff was duly sworn.)

The Court: You may retire with the bailiff.

(Thereupon the jury retired from the court room in custody of the bailiff to consider its verdict.)

Mr. Stockton: May there be an exception to your Honor's refusal to answer the juror's questions?

The Court: Yes.

Mr. Stockton: All right.

(Thereupon the trial ended.)"

We, as counsel for appellees, regret the dereliction of our duty to this court to properly ascertain the correctness of the Bill of Exceptions and Transcript of Record when it was served upon us by counsel for appellant, and through our oversight to cause the trial court to certify to an improper record. A proceeding for the diminution of the record to correct the above error, however, is now being prepared under authority of the rules of this court, and will in due time be filed with the Clerk. It is expected, of course, that this court will, upon a proper showing, correct the Transcript of Record to conform to the actual proceedings had in the trial of these cases, and for that reason we now base our argument on the record as corrected.

It will be noted from the reporter's transcript that appellant did not reserve his exception to the failure of the court to answer the juror's question until after the jury had retired. In fact, the Transcript of Record as it now stands (182-183) is clouded with uncertainity on this point; and, as we understand the rule applicable to this procedural question, the record must show clearly and affirmatively that the exception was saved "while the jury was still at the bar".

Rule No. 30 of the Rules of Practice of the United States District Court for the District of Arizona, in force at the trial of these cases, provides in part:

> "Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired * * *."

In a number of well considered decisions this court has uniformly enforced this rule, holding that it is more than a mere technicality to be sustained or ignored at the whim or caprice of the court. One of the early decisions by this court is the case of Arizona & New Mexico Ry. Co, v. Clarke, 207 Fed. 817, 823, 824, in which this court cites the case of Phelps v. Mayer, 15 How. 161, 14 L. Ed. 643 as authority, and holds that an exception to the charge of the court must be taken before the jury retires, otherwise it will not be considered on appeal. In the more recent case of Lee Tung v. United States, 7 Fed. (2d) 111, 112, this

court emphasizes the necessity of a timely exception, and the reason therefor, in language following:

> "The rule requiring exceptions to be taken before the retirement of the jury is not a technical one. The object of the rule is to give the trial court an opportunity to correct the charge before the jury retires, at least before the verdict is returned, thus avoiding the necessity for granting a new trial, or for reversal on appeal, for errors that might have been corrected at the time of their occurrence."

It now affirmatively appearing from the corrected record that appellant's exception came too late to be considered on this appeal, we have no doubt that this court will now enforce the rule so strictly adhered to through a long line of decisions, and that further argument on our part is unnecessary. Regardless of that, however, we submit that no prejudicial error was committed by the trial court in failing to answer the juror's question, particularly in view of the court's admonition to the juror to "wait until you get into the jury room" (182).

The question actually asked by the juror (and not as reported in the present Transcript of Record) was, to say the least, rather ambiguous and confusing, rendering it difficult for the court to know whether he was being asked to express an opinion on the evidence, in the guise of an instruction, or whether the juror, as a precautionary measure, was merely anticipating a question that might never arise. In this uncertainty, the court's admonition

"You haven't found anything yet. Wait until you get into your jury room," was undoubtedly the proper instruction at the time. The juror, at least, was apparently satisfied to wait until the jury as a whole determined whether the point raised by the question would enter into or influence their verdict, for his response to the court was, "All right."

It seems to us that the only reasonable construction to be placed upon the whole incident is that the court directed, inferentially, that, if the identity of the driver became an issue in the jury room, and additional instructions were desired, they would be forthcoming, and that the jury, including the juror Ford, so understood the matter.

We confess our inability to discover any case analogous to this situation. In C. E. Kennedy v. Nathalie Bruce, 5 Tenn. App. 583, 587 (no citation to the Reporters System was found) the following colloquy between a juror and the court is reported:

> "Juror: May I ask a question?
>
> Court: No, sir, you can't ask any individual question. After you get out in the jury room, and if you want additional instructions from the court, the court will be pleased to give you instruction on whatever point you desire.
>
> Juror: If you please, this is a question that I think decides the case one way or the other. It is as to the interpretation of certain evidence, if we so find the evidence.

> Court: The jurors are the absolute judges of the evidence. The court has nothing to do with that at all. You must decide that yourself, and for yourselves."

In holding that the refusal of the court to answer the juror's question was not error, the Court of Appeals of Tennessee (certiorari denied by Supreme Court of Tennessee) said in part:

> "If the jury desired further instruction on any point they were told by the court that he would be pleased to give the further instructions if the jury should request it. The jury did not return from the jury room to request further instructions although they had been specifically invited to do so should they so desire."

In the cases at bar, the jury, likewise, made no further request for enlightenment upon the law, from which it may be inferred that they understood and acted upon the court's instructions—which undoubtedly completely covered the issue raised by the juror's question—and that no misunderstanding arose as to the law applicable to the various phases of the evidence under consideration by them. Counsel for appellant, however, on page 54 of his brief, indulges in fantasy and speculation as to possible occurrences in the jury room, resulting from the failure of the court to answer juror Ford's question, but there is nothing in the record of these cases to indicate, as suggested by counsel in his brief, a confused state of mind of the jurors, or a possible misunderstanding of the law on their part. The jury

had complete and proper instructions on every issue involved in these cases, and to quote the language of the Supreme Court of the United States in Graham and The Title & Guaranty & Surety Company v. United States, 231 U. S. 474, 481:

> "It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the instructions of the court."

There was not a scintilla of evidence that any person, authorized or unauthorized, was operating appellant's truck on its trip from Tucson to Phoenix in appellant's business other than the regular driver Joe Smith. On this theory of appellees' case, and the evidence supporting it, the jury were properly instructed (178):

> "* * * and in this case, unless the plaintiff has proved by a preponderance of the evidence, that the alleged injuries to the plaintiffs was caused by an act of Joe Smith, in the execution of the service for which he was engaged by the defendant, then you must find the issue in favor of the answering defendant. * * *"

Moreover, appellant did not defend these cases upon the theory that the truck, at the time of the accident, was being operated in appellant's business by some unauthorized person, and there is no evidence whatever to that effect; appellant's theory was solely one of non-liability on the grounds of a departure from line of duty by appellant's employee. On this

theory, and on the basis of the evidence supporting it, the jury were correctly told (176-177) that, if there was a departure from line of duty by the employee at the time of the accident, then:

> "It made no difference whether Joe Smith, or some other person drove said truck."

In short, the juror's question was not predicated on any evidence in the case, and any instruction responsive to it could not have been determinative of any issue involved. The question was directed to a wholly extraneous and immaterial matter, and it is not error for a court to deny a request for instructions on such matters.

Sweeney v. Irving, 228 U. S. 233, 242, 33 S. Ct. 416, 57 L. Ed. 815.
Employers Liability Assur. Corporation Limited of London, England v. Dean, 44 Fed (2d) 524, 526.
United Shoe Machinery Corporation v. Paine, 26 Fed. (2d) 594, 598.

It is to be noted further that appellant submitted no request for instruction raising the point of law involved in the juror's question, or took exception to the court's instruction, as quoted above, on that point; and, as an instruction based on the juror's question could not possibly have varied from the ones already given, this matter now falls within the rule applied in Allen et al v. Fields et al, 144

Fed. 840, 842, and in United States v. Sprinkle et al, 57 Fed. (2d) 968, 970.

We respectfully submit that no prejudicial error was committed in the trial of these cases and that they should now be affirmed.

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